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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

In re:

CHAPTER 7

GAYLE CHRISTINE MACARTHUR,

NO. 07-44105

Debtor.

GAYLE CHRISTINE MACARTHUR,

ADVERSARY NO.

Plaintiff,

vs.

PROSPER MARKETPLACE, dba
PROSPER.COM,

**COMPLAINT FOR DAMAGES FOR
WILLFUL AND MALICIOUS VIOLATION OF
AUTOMATIC STAY AND DISCHARGE
INJUNCTION**

Defendant.

COMES NOW THE DEBTOR, by and through her attorney, Dorothy A. Bartholomew, and files this Complaint asking the Court to find that Prosper Marketplace dba Prosper.com has committed wilful, malicious, oppressive, egregious, and bad faith violations of the automatic stay and violation of the discharge injunction and to issue an order awarding the plaintiff punitive damages, attorney fees and costs, and granting the plaintiff further relief as the Court deems necessary or equitable. In support thereof, the attorney represents as follows:

I. JURISDICTION AND VENUE

- 1.1 Plaintiff Gayle Christine Macarthur is the debtor in the above Chapter 7 proceedings.
- 1.2 Defendant Prosper Marketplace dba Prosper.com is a creditor in the case.
- 1.3 This Court has jurisdiction over the subject matter as an adversary proceeding under 28 U.S.C. § 1334, 28 U.S.C. §157(b)(1) , and 28 U.S.C. 157(b)(2)(e), as this is a proceeding to determine whether the defendant's acts qualify as willful and malicious violations of the automatic stay within the meaning of 11 U.S.C. §362(h) and 11 U.S.C. §727 .

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1.4 The debtors' attorney is satisfied that the proper grounds exist for filing this action

II. PARTIES

2.1 Plaintiff reassert paragraphs 1.1 through 1.4 by reference.

2.2 Plaintiff petitioned this Court for relief under Chapter 7 of the Bankruptcy Code on November 29, 2007.

2.3 Plaintiffs may serve the defendant by mailing a copy of the Summons and Complaint, by Certified Mail, to Prosper Marketplace at;

Prosper Marketplace
Attn: Managing Agent
111 Sutter St. Fl. 22
San Francisco, CA 94104

National Corporate Research LTD
Registered Agent for Prosper Marketplace, Inc.
1780 Barnes Blvd. SW
Tumwater, WA 98512

National Corporate Research LTD
Registered Agent for Prosper Marketplace, Inc.
523 W 6th St. Ste 544
Los Angeles, CA 90014

The Corporation Trust Company
Registered Agent for Prosper Marketplace, Inc.
1209 Orange St.
Wilmington, DE 19801

Fed. R. Bankr. P. 7004(b)(3); Fed. R. Civ. P. 4(h).

II. FACTS

3.1 The debtor petitioned for relief under Chapter 7 on November 29, 2007

3.2 The Prosper Marketplace is a creditor in the debtors' case.

3.3 The Prosper Marketplace was listed as a creditor on Schedule F.

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COMPLAINT FOR WILLFUL VIOLATION OF AUTOMATIC STAY - Page 2

F:/Dorothy/adversary proceedings/violation auto stay/harassing phone calls/Franklin, Eric and Arlene.wpd

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3.4 That Prosper Marketplace dba Prosper.com has contacted the debtor several times by email and mail after the filing of the bankruptcy. The debtor emailed the company to advise them that she had filed for protection under Chapter 7 Bankruptcy and referred them to call their attorney, Dorothy Bartholomew.

3.5 That Prosper.com continued emailing the debtor wherein they indicated that they had knowledge of the bankruptcy proceedings. Debtor's attorney has also sent written notification of the bankruptcy filing.

3.6 The debtor had filed a prior adversary proceeding against Prosper Marketplace dba Prosper.com. Prosper Marketplace dba Prosper.com settled and agreed to cease all contact.

3.7 That Prosper Marketplace dba Prosper.com again contacted the debtor several times by email after the discharge of the bankruptcy in violation of 11 U.S.C. §727.

V. 11 U.S.C. 362(h)

4.1 The plaintiff reasserts the facts contained in paragraphs 3.1 through 3.7 above.

4.2 Except as provided in 362(b), a petition filed under section 301, 302, or 303 of this title operates as a stay of any act to collect, assess, or recover a claim against the debtors that arose before the commencement of the case under Section 362 (a) provides that it is agathis was the type of action prohibited by section a.

4.3 The acts were of a type prohibited by Section 362(a) and 7 and Section 727. The making of phone calls to the debtors by a creditor for the purpose of attempting to collect a pre-petition debt is a violation of Section 362(a)(6) and may be entitle the debtor to actual damages under Section 362(h). *See McHenry v. Key Bank*, 179 B.R. 165 (BAP 9, 1995). This was an attempt to collect the debt as the debtor demanded payment of the debt.

4.4 The acts were not of a type permitted under Section 352(b) and Section 727.

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4.5 The acts committed incurred after the filing of the bankruptcy petition and prior to the termination of the stay and after discharge.

4.6 An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362(h).

4.7 The general rule is that a willful violation of the automatic stay is established when it is shown that a creditor or other violator was aware of the stay and intentionally committed an act that was in violation of the stay, regardless of whether the violator knew that the act violated the stay. *In re Schwartz*, 954 F.2d 569 (CA 9, 1992).

4.8 The violations were willful. Prosper Marketplace dba Prosper.com had notice of the bankruptcy proceedings and continued collection attempts.

4.1 Under 11 U.S.C. § 362(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay of (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtors.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay (6) under subsection (a) of this section, of the setoff by a financial institution of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a

4.8 The general rule is that punitive damages for a willful violation of the automatic stay are recoverable under Section 362(h) only if the offending party's conduct was malicious, oppressive, egregious, or in bad faith. *Ramirez v. Fuselier*, 183 BR 583 (BAP 9, 1995).

4.5 The violation was malicious and intended to harm the debtor and was specifically intended to coerce the debtors into repaying a debt that she had a right to discharge in bankruptcy.

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PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for the following relief:

- 7.1 Pursuant to 11 U.S.C. § 326(h), for a determination that the defendant willfully and maliciously violated the automatic stay and discharge.
- 7.2 Pursuant to 11 U.S.C. § 362(h), for attorney fees and costs.
- 7.3 Pursuant to 11 U.S.C. § 362(h), for punitive damages of \$5000.00.
- 7.3 For other relief as is just and proper.

DATED this 29th day of April, 2008

/s/ Dorothy A. Bartholomew
Dorothy A. Bartholomew, WSBA #20887
Attorney for Plaintiff